Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

92-1227

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992 TERM

GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation,
Petitioners,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,
Respondent.

and

Gordon E. Powelson, Personal Representative of the ESTATE OF CLYDENA M. GROSS,
Petitioner,

v.

UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROY B. THOMPSON
(Counsel of Record)
ROY B. THOMPSON, P.C.
SUITE 855
621 SW MORRISON
PORTLAND, OR 97205
(503) 224-0831

QUESTIONS ON APPEAL

1. Whether the Ninth Circuit erred in failing to address the issue (raise by the appellants) of Powelson the individual having raised a quiet title/declaratory judgment claim prior to the tax sale of his property. Sub-issue: Whether the Ninth Circuit erred in failing to address the error made by the District Court in ruling that the exclusive remedy after the tax sale was a claim for refund and dismissing the quiet title/declaratory judgment action.

2. Whether the Ninth Circuit erred in failing to address the issues (raised by the appellants) of the defects in the Levy and the Notice of Intent to Levy prior to the defective delivery of the Notice of Sale. Sub-issue: the distinction between the Personal Representative of the Estate and the Individual distributee.

3. Whether the Ninth Circuit erred in failing to address the issue (raised by the appellants) of the gap in the chain of title created by the government having seized the interest of the Individual distributee, yet having sold the interest of the Estate which had transferred the property years prior to the sale.

4. Whether the Ninth Circuit erred in ruling that where a tax sale is defective the remedy is a remand for a determination of whether the claim is merely for refund or is more akin to conversion, even after the Ninth Circuit has said "the sale can not stand."

TABLE OF CONTENTS

QUESTION ON APPEAL	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	3
Nature of the Case	3
Course of Proceedings Below	5
Facts	8
REASONS FOR GRANTING THE WRIT	12
STATUTES INVOLVED	24
CONCLUSION	24

TABLE OF AUTHORITIES
CASES

Thatcher v. Powell, 19 U.S. (6 Wheat.) 119, 125 (1821), Marshall, C.J. p. 12

Aqua Bar & Lounge, Inc. v. U.S. Dep't. of Treasury, 539 F2d 935 (3rd Cir. 1976) p. 20

U.S. v. Heffner, 420 F2d 809 (4th Cir. 1969) p.13

Johnson v. Gartlan, 470 F2d 1104 (4th Cir. 1973)p. 18

Martinez v. U.S., 669 F2d 568 (9th Cir. 1981) p. 15

Van Antwerp v. U.S., 92 F2d 871 (9th Cir. 1937)p. 17

U.S. v. Coson, 286 F2d 453 (9th Cir. 1961) p. 20

Collins v. U.S., 532 F2d 1344 (Ct.Cl. 1976) p. 22

Hofheinz v. U.S., 511 F2d 661 (5th Cir. 1975) p. 22

Hanify v. Commissioner, 21 B.T.A. 379 (1930) p. 22

Rodriguez v. U.S. 629 F Supp 333, 341 (ND Ill, 1986) p. 14, 15

Little River Farms, Inc. v. U.S. Dep't. of Treasury, 328 F Supp 476, 478 (ND Ga, 1971) p. 14, 18

STATUTES AND RULES

28 USC §2410	5
26 USC §6331	9, 22
26 USC §6213(a)	10
26 USC §7421	10
28 USC §2201(a)	10
26 USC § 6901(h)	14, 15
26 USC § 7701(a)(14)	14, 15

INTRODUCTION

This petition for writ of certiorari is from the Order and Amended Opinion of the Ninth Circuit Court of Appeals in two consolidated cases. The first action was Gordon E. Powelson as PERSONAL REPRESENTATIVE OF THE ESTATE OF CLYDENA M. GROSS, Plaintiff and GORDON E. POWELSON, Individual v. UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE, D.Ct. Civil No. 87-952-FR, 9th Cir. Docket No. 89-35736. The second action was GORDON E. POWELSON, an individual, and CHICAGO TITLE INSURANCE COMPANY OF OREGON, an Oregon corporation, Plaintiffs, v. UNITED STATES OF AMERICA, acting by and through its Secretary of the Treasury and its INTERNAL REVENUE SERVICE, Defendant., D. Ct. Civil No. 89-512-FR, 9th Cir. Docket No. 90-35005.

At the heart of this case is the plaintiffs'-petitioners'

assertion that the procedures used by the Internal Revenue Service in collecting Estate Tax liability were improper and illegal entitling the plaintiffs to a refund of the tax collected and/or a return of the property to its owner.

OPINIONS BELOW

The Ninth Circuit opinion below is reported as Powelson v. United States by and through Secretary of Treasury, 963 F.2d 1156 (9th Cir. 1992) [advance sheets only - withdrawn from bound volume at the request of the Ninth Circuit]. The District Court opinion in Civil No. 87-952-FR is reported as Powelson v. U.S., 64 AFTR 89-5932 ¶148,983.

JURISDICTION

The last Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit affirming in part, reversing in part and remanding the District Court judgment is dated December 8, 1992. Appendix A. That Order and Amended Opinion did not change the disposition of the case contained in the prior Order and Amended

Opinion which was filed October 23, 1992. This petition for certiorari is timely pursuant to Supreme Court Rule 13.4. Petitioners have filed a petition with the Ninth Circuit for a rehearing en banc, which does not stay the time for this petition for certiorari. Jurisdiction of this Court over this matter is invoked pursuant to 28 USC §1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

1(a) Docket No. 89-35736, D.Ct. No. 87-952: Plaintiff, Gordon Powelson as the Personal Representative of the Estate of Clydena M. Gross, commenced this action as a declaratory judgment action on August 21, 1987, after the defendant issued a Notice of Levy and Notice of seizure of real property for failure of plaintiff to pay Estate taxes. Plaintiff alleged that the Notice of Levy was illegal for failure of the IRS to issue the statutorily required Notice of Intention to Levy. Later the IRS issued a Notice of Intention to Levy and a second Levy and proceeded to sell

the property. Plaintiff alleged a series of procedural defects in the notices and the sale. Prior to the sale the personal representative, joined by the distributee, were granted leave to file an Amended Complaint which included 28 USC §2410 (Quiet Title) in its jurisdictional allegations. After the sale, the District Court ruled that the only relief available was for the Estate, through the personal representative, to bring an action for refund.

1(b) Docket No. 90-35005, D.Ct. No. 89-512: Plaintiff Gordon Powelson, in his individual capacity as distributee, commenced this action as one for declaratory judgment and quiet title on May 16, 1989, after his property had been sold by the IRS to pay the estate taxes owed by the Estate of Clydena M. Gross. Upon motion, the complaint was amended to add Chicago Title Insurance Company of Oregon, the purchaser at the tax sale, as an additional plaintiff. Plaintiffs alleged a series of defects in the notices and sale and alleged that there was a cloud on the title of the

purchaser due to the irregularities.

2(a) Course of Proceedings and Disposition Below

Docket No. 89-35736, D.Ct. No. 87-952: Defendant first moved against the original complaint on the grounds of lack of subject matter jurisdiction. The District Court ruled that jurisdiction did exist for a declaratory judgment action when the complaint does not attack the amount of the tax assessed, but only alleges procedural defects in the collection process. Appendix K. Prior to the scheduled sale an Amended Complaint was allowed, Appendix J, which added the individual distributee of the property as an additional plaintiff and included 28 USC §2410 (Quiet Title) in its jurisdictional allegations. Appendix I. The property was sold by the IRS on April 21, 1988.

After the sale of the property the District Court ruled that declaratory judgment was no longer available to the plaintiffs and that the only remaining remedy was a claim for refund by the Estate. Pursuant to this ruling, the Estate filed

an administrative claim for refund with the Internal Revenue Service. Eventually the Estate and the distributee were granted leave to file a Third Amended Complaint. The government then moved to strike the Third Amended Complaint on the ground that it contained declaratory judgment and quiet title claims in the name of the distributee, which had been allowed by the District Court in the first Amended Complaint of April 1988. The District Court granted the motion to strike and allowed the plaintiffs to file a Fourth Amended Complaint (Appendix D) which contained only a claim for refund for the Estate, and became the operative pleading. Upon cross-motions for summary judgment, the District Court granted summary judgment to the government and against the plaintiff on all counts. Appendix B.

2(b) Docket No. 90-35005, D.Ct. No. 89-512: Because the District Court would not recognize the existence of the individual distributee as a co-plaintiff in the first case,

Gordon Powelson, in his individual capacity as distributee commenced this action alone. The complaint was similar to the one filed in the Estate's case, but with an additional claim that the sale was defective for not having been held in the county in which the property was levied upon and seized. After motion plaintiff Chicago Title was added. The District Court granted the government's motion to dismiss ruling: (1) both Powelson the individual distributee and Chicago Title were third parties and therefore there was no waiver of sovereign immunity; and (2) there was no jurisdiction over the quiet title portion of the complaint because once the property was sold the government no longer claimed a lien on it. The plaintiffs then moved for reconsideration and for leave to amend the pleadings to reflect that since the title that was given to the purchaser was defective, the government had never transferred title to the property it had seized, and so the government still had an interest in the property. On November 22, 1989, the District Court issued

an order denying plaintiffs' motion for reconsideration. Appendix M. The District Court further ruled that the merits of the taxpayer's claim that the collection of the estate taxes was illegal were "fully litigated and determined" in the Estate's case. Appendix V.

3. Facts

Clydena M. Gross died testate July 29, 1980. The Will included a bequest of a pizza restaurant in Portland, Multnomah County, Oregon to Gordon E. Powelson, the son of the decedent. Beginning with the date of death, Powelson the individual treated the property as his own, collecting rents and paying property taxes.

The provisions of the Will also named Gordon Powelson as the Personal Representative of the Estate. The Will was probated in the Circuit Court of the State of Oregon for the County of Washington.

On or about June 30, 1981, an estate tax return was filed by the Estate showing estate taxes due in the amount of

$120,521.00. On August 17, 1981, the defendant assessed federal estate taxes and interest against the Estate in the sum of $147,492.24.

On January 20, 1982, the Washington County Probate Court order that the real property be distributed **from** the Estate to Gordon Powelson **the individual** nunc pro tunc July 29, 1980. Pursuant to the order, a Personal Representative's Deed was issued from the Estate to Gordon Powelson, and duly recorded.

On July 1, 1987, the government served Powelson the individual as distributee of the real property with a Statement of Levy and a Notice of Seizure, both based upon the failure of the Estate to pay the estate tax. Soon thereafter, the Estate's original complaint was filed asking for a declaration that because the government failed to issue a 10-day Notice of Intention to Levy as required by 26 USC §6331, the Levy and Seizure were void for failure to follow the required procedures. The Estate challenged only the procedural

validity of the tax levy and not the merits of the alleged tax liability. The government responded by challenging the jurisdiction of the District Court to hear any matter relating to internal revenue whatsoever. The District Court properly ruled that since the challenge was only to the procedures and not to the amount of the tax assessed, jurisdiction would lie under the statutory exception of 26 USC §6213(a) to the Anti-Injunction Act at 26 USC §7421, and therefore the action was allowed under the Declaratory Judgment Act, 28 USC §2201(a).

On February 5, 1988, the government sent to the Estate a Notice of Intention to Levy. On February 16, 1988, the government issued second Notices of Levy and Seizure to Powelson the individual as distributee of the property. On February 29, 1988, the government issued to the distributee of the property a release of the July 1, 1987 levy. On March 9, 1988, a Seizure and Sale worksheet was issued to the Estate.

On March 23, 1988, two IRS officers went to Powelson's residence to personally deliver a Notice of Sealed Bid Sale. The Notice offered for sale the interest of the individual distributee. Powelson was not home on this one attempt at personal delivery of the Notice, so the IRS sent copies of the Notice of Sealed Bid Sale by regular and certified mail.

Prior to the sale, an Amended Complaint was allowed which added the individual distributee as an additional plaintiff and asserted quiet title in its jurisdictional allegations.

On April 21, 1988, the property was sold by the IRS for $400,000.00 at its collection offices in Oregon City, Clackamas County, Oregon, even though the property was located in Multnomah County, Oregon. The deed given by the IRS after the sale purported to transfer the right, title and interest of the Estate of Clydena M. Gross, even though the property had been seized from the individual distributee.

After the sale the District Court ruled that the only action left was for the Estate to pursue a refund. Because the property belonged to the individual distributee, the plaintiffs attempted to amend the pleadings to claim a refund for the Estate and for declaratory judgment and quiet title for the individual. This was rebuffed by the District Court, leading to the Fourth Amended Complaint as the operative pleading in the first case.

On or about April 20, 1989, the IRS sent a check to the attorney for the Estate in the amount of $93,186.48 as "excess proceeds" from the sale. Pursuant to the instructions from the District Court, Appendix C, the funds have been deposited into escrow pending the final outcome of this case.

REASONS FOR GRANTING THE WRIT

> That no individual or public officer can sell, and convey good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which

> has been repeatedly recognized in this court. Thatcher v. Powell, 19 U.S. (6 Wheat.) 119, 125 (1821), Marshall, C.J.
>
> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. U.S. v. Heffner, 420 F2d 809 (4th Cir. 1969).

A. The Ninth Circuit erred in failing to address the issue (raise by the appellants) of Powelson the individual having raised a quiet title/declaratory judgment claim prior to the tax sale of his property. This issue was raised on appeal, but not addressed by the Ninth Circuit.

After the sale, the District Court ruled that the only remedy available to anyone was an action for refund by the Estate. That order allowing amendment only insofar as the Estate's claim for refund was entered on January 19, 1989. The District Court denied that the individual distributee whose property had been seized any longer had an available action for a declaration that the seizure and sale were illegal, even though the District Court had earlier allowed the first

Amended Complaint. The District Court's analysis was that since it was the Estate which was the primary taxpayer, the Estate was the only entity with a claim against the IRS. That analysis ignores the fact that it was the distributee who was most injured by the illegal and improper sale of the property, and that the individual distributee is liable for payment of the tax. 26 USC § 6901(h) and 7701(a)(14).

It was still within the District Court's jurisdiction to make a declaration as to the procedures used. The prohibition within the Declaratory Judgment Act against declarations "with respect to federal taxes" does not apply to procedural challenges. Rodriguez v. U.S. 629 F Supp 333, 341 (ND Ill, 1986). 28 USC §1340 does vest the District Court with jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. Little River Farms, Inc. v. U.S. Dep't. of Treasury, 328 F Supp 476, 478 (ND Ga, 1971). It is true that if this were an action challenging the amount or validity of the underlying

assessment the actio would be barred. But, when an action challenges only the procedural validity of a tax levy, the federal courts have jurisdiction and can grant injunctive and declaratory relief. Rodriguez, supra at 336; Martinez v. U.S., 669 F2d 568 (9th Cir. 1981).

Since it was the distributee whose property was sold, it is the distributee who has the greatest interest in a declaration that the procedures used in the seizure and sale were invalid. The District Court ruled, in effect, that since the Estate was the taxpayer, only the Estate had an interest in the sale, and the only remedy was a claim for refund by the Estate. Under 26 USC §§6901(h) and 7701(a)(14), the distributee is also deemed to be a taxpayer for the purposes of the Internal Revenue Code. In the District Court's grant of summary judgment to the IRS, Appendix B, it commented that "Powelson was personally liable for the estate tax in both his individual and representative capacities. This is directly contradicted by the District Court's comment at Appendix V

that "The court finds that in this case there is no basis for extending the waiver of sovereign immunity to third parties such as Powelson and Chicago Title." Either Powelson the individual is directly liable for payment of the estate tax and is therefore not a third party, or he is not liable for the tax and his property should not have been seized and sold. The District Court's rulings contradict one another, yet the Ninth Circuit failed to address this inconsistency. **If nothing else, this contradiction and inconsistency must be reviewed and overturned by this Court.**

Just as it was improper and illogical for the District Court to dismiss the declaratory judgment and quiet title actions of the individual distributee after the tax sale, so it was equally improper to dismiss those claims brought by the Estate and the distributee in the first action before the sale

An action for refund is an alternative remedy available in addition to a declaration that the sale was procedurally illegal. The declaration of illegality is a precursor to the

remedy of refund. Martinez, supra. This is not a matter of the tax being overpaid in amount, other than the tax collection procedures being illegal. Petitioners contend that when the tax is collected through illegal procedures, the any amount collected is excess. The initial declaration of illegality is what leads to the remedy of refund, rather than the refund being the initial cause of action.

To rule that after the sale the exclusive remedy is a claim for refund is to ignore the fact that the procedures used in the seizure and sale were illegal. Such a ruling, not addressed by the Ninth Circuit, would give credence to the IRS contention that so long as the amount collected is no greater than that which is owing, the method of collection is irrelevant. See, e.g. Van Antwerp v. U.S., 92 F2d 871 (9th Cir. 1937). In other words, such a ruling is an invitation to the Internal Revenue Service to us any illegal means of collection they want, so long as the amount collected is not excessive.

It should be noticed that declarations of illegality in the sale procedures have been dealt with in the courts before. Johnson v. Gartlan, 470 F2d 1104 (4th Cir. 1973) was an action in equity to quiet title to land that had been sold at a tax sale. While the court there refused to set the sale aside as having been ratified by cashing the check for the excess proceeds, the district court there had not dismissed the action on "refund only" grounds. The action was allowed to proceed as a quiet title case without any requirement of filing a claim for refund.

Little River Farms, Inc. v. U.S., 328 F Supp 476 (ND Ga, 1971) was an action by a taxpayer whose property was seized and sold for payment of back income taxes, charging that the injury was caused by noncompliance with the mandatory statutory collection procedures. The court there interpreted the language of the quiet title statute broadly, and stated:

> Since the validity of a sale under § 6335 would case a cloud on the title of the assets, we

> adhere to the view in *Popp v. Eberlein*, 409 F2d 309 (7th Cir., 1969) that the taxpayer's remedy falls under 28 USC § 2410. ... As the Court views the situation, the taxpayer has a right under § 6335 but no remedy for enforcing it except § 2410. 328 F Supp at 479, emphasis added.

The Northern District of Georgia properly allowed the suit to proceed along the lines that the petitioners here have presented their cases since before the tax sale.

B. The Ninth Circuit erred in failing to address the issue (raised by the appellants) of the gap in the chain of title created by the government having seized the interest of the Individual distributee, yet having sold the interest of the Estate which had transferred the property years prior to the sale.

The District Court ruled that once the sale took place, no quiet title action would lie because the government "does not have or claim a mortgage or other lien against the subject property" after the tax sale. Appendix V. On the other hand, the Ninth Circuit has in the past defined quiet title more

generally and suggested that it comprehends a suit to remove a cloud upon the title of a plaintiff. U.S. v. Coson, 286 F2d 453 (9th Cir. 1961). An illegal and improper sale creates a cloud upon the title.

The title given to the purchaser at the tax sale transferred the right, title and interest of the Estate of Clydena M. Gross whereas the property was seized from the individual distributee. The property had been transferred from the Estate to the distributee several years prior to the sale. Therefore the sale did not relinquish the lien of the government on the property which had been seized from the individual. Since the lien was not extinguished at the sale and transfer of whatever title was given, the IRS does have or claim a lien against the subject property.

The more important case where the court allowed a quiet title action to proceed even after the sale of the subject property is Aqua Bar & Lounge, Inc. v. U.S. Dep't. of Treasury, 539 F2d 935 (3rd Cir. 1976). In that case the

district court had dismissed the complaint for lack of jurisdiction, based upon 28 USC § 2201 and 26 USC § 7421. On appeal, the Third Circuit ruled that 28 USC § 1340 in combination with 28 USC § 2410 provided jurisdiction and a waiver of sovereign immunity where, as here, the procedures were challenged, but not the validity of the underlying assessment. "[B]oth the tax lien asserted by the government and the sale ... if indeed invalid, would cause clouds on the title. ... An action to quiet title is the proper method of removing such clouds on title." 539 F2d at 937-38, citations omitted.

The fact that the Third Circuit allowed the quiet title action to proceed and the Ninth Circuit has refused to allow it to proceed creates a conflict among the circuits. S.Ct. Rule 10.1(a).

C. The Ninth Circuit erred in failing to address the issues (raised by the appellants) of the defects in the Levy and the Notice of Intent to Levy prior to the defective delivery of the

Notice of Sale.

Prior to the sale, the government issued to the Estate a 10 day notice of intention to levy upon property held by the distributee. The government argued in support of its motion for summary judgment that the entities were interchangeable since the Personal Representative of the Estate and the individual distributee are embodied in the same human being. On the other hand, had the suit been brought in the name of the wrong entity, the government would have moved to dismiss. Collins v. U.S., 532 F2d 1344 (Ct.Cl. 1976); Hofheinz v. U.S., 511 F2d 661 (5th Cir. 1975); Hanify v. Commissioner, 21 B.T.A. 379 (1930). The distinction between the two entities is important. The persona of personal representative is purely a creation of law and is a separate entity from the distributee of the property, even where embodied in the same human being.

The requirements of 26 USC § 6331(d)(1) were not here satisfied prior to the sale. That subsection makes it

clear that it is the owner of the property who must be given the Notice of Intention to Levy. Notice in this case was given to the Estate. The levy and seizure were of the property of the distributee. Notice to the personal representative, a legally separate entity created by law, does not satisfy the statute, and the procedures used before the sale were invalid. The Ninth Circuit did not reach this issue, but more than just the sale must be set aside - the seizure of the property must also be set aside.

D. Whether the Ninth Circuit erred in ruling that where a tax sale is defective the remedy is a remand for a determination of whether the claim is merely for refund or is more akin to conversion, even after the Ninth Circuit has said "the sale can not stand."

The actions below were based upon improper procedures used by the IRS in the seizure and sale. Such actions arose from injuries caused by noncompliance with the mandatory provisions of the tax collection statutes. The

claims were never properly solely for refund, since the actions of the government were illegal. What the Ninth Circuit ignored was the fact that the distributee had joined in the original action below prior to the sale of his property, and jurisdiction therein was grounded in part on quiet title, not refund. For the Ninth Circuit to now rule that the case must be remanded for a determination of whether the claim is analogous to conversion or purely a refund which would be denied makes no sense, and this Court must review that ruling.

STATUTES INVOLVED

The statutes involved in this matter are set out verbatim in the appendices.

CONCLUSION

The Ninth Circuit has missed crucial points involved in the cases below. In addition, its blanket ruling that no quiet title action will lie after the tax sale is wrong on the facts and sets up a conflict among the circuits. This Court

must therefore review these consolidated actions. in order to avoid such a conflict among the circuits.

Respectfully submitted,

/s/ ROY B. THOMPSON

By:_____

ROY B. THOMPSON
(Counsel of Record)
ROY B. THOMPSON, P.C.
Suite 855
621 SW Morrison
Portland, OR 97205
(503) 224-0831